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# Preliminary Procedural Protection for the Press from Jurisdiction in Distant Forums After *Calder* and *Keeton*\*

David I. Levine\*\*

## I. INTRODUCTION

Ever since the Fifth Circuit came to the rescue of the *New York Times* in 1966, by holding that "First Amendment considerations surrounding the law of libel require a greater showing of contacts to satisfy the due process clause than is necessary in asserting jurisdiction over other types of tortious activity,"<sup>1</sup> there has been substantial debate on whether it is necessary or even sensible to graft the first amendment onto jurisdictional analysis under the due process clause.<sup>2</sup> Although some commentators and courts have accepted the concept and have warmly supported it, others have attacked the idea.<sup>3</sup>

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1. *New York Times Co. v. Connor*, 365 F.2d 567, 572 (5th Cir. 1966). The defendant publisher had appealed a \$40,000 jury verdict awarded to plaintiff Eugene "Bull" Connor, then a City Commissioner of Birmingham, Alabama. Connor's libel action was one of seven separate suits based on one article published in the *Times* in April, 1960, on racial conditions in Alabama. *Id.* at 568-69. See *New York Times*, May 17, 1961, at 22. At one point, the *New York Times* faced seventeen libel actions in southern courts based on reporting of racial tensions. The aggregate damages claimed were \$288 million. Pedrick, *Freedom of the Press and the Law of Libel: The Modern Revised Translation*, 49 CORNELL L.Q. 581, 582 n.2 (1964) (citing *New York Times*, Apr. 4, 1963, at 12).

2. See articles cited *infra* note 11. When faced with this problem, the *Restatement* took no position. RESTATEMENT (SECOND) OF CONFLICT OF LAWS §§ 36, 37 (1971).

3. See articles divided accordingly, *infra* note 80. Overall, the reaction in the courts to the *Connor* doctrine was not favorable. Many courts, including three other federal circuits, rejected the concept as originally expressed by the Fifth Circuit. *E.g.*, *Church of Scientology v. Adams*, 584 F.2d 893, 899 (9th Cir. 1978); *Anselmi v. Denver Post, Inc.*, 552 F.2d 316, 324 (10th Cir.), *cert. denied*, 432 U.S. 911 (1977); *Buckley v. New York Post Corp.*, 373 F.2d 175, 182-83 (2d Cir. 1967); see also cases collected in Scott, *Jurisdiction Over the Press: A Survey and Analysis*, 32 FED. COM. L.J. 19, 30-31 nn.54-59 (1980). A few courts, however, have been far more accepting of the doctrine. *E.g.*, *Cox*

After allowing lower courts to develop and consider the *Connor* doctrine for many years,<sup>4</sup> the Supreme Court finally accepted two cases for review, *Calder v. Jones*<sup>5</sup> and *Keeton v. Hustler Magazine, Inc.*,<sup>6</sup> and emphatically rejected the doctrine that first amendment policy concerns belong in the analysis of personal jurisdiction. In essence, the two opinions hold merely that all components of the press, especially those publishing or writing in nationally circulated publications, are not entitled to greater protection under the due process clause than other defendants.<sup>7</sup> The Supreme Court's unequivocal and sweeping rejection of the doctrine, however, creates a risk that the effect of the opinions will spread beyond the narrow issue presented and decided in those two cases. Lower courts, faced with Supreme Court opinions that contain only sweeping conclusory statements in an uncertain area of law laced with contradictions and abstraction<sup>8</sup> may apply the result reached in *Calder* and *Keeton* to factual settings that should be distinguished.<sup>9</sup> As a consequence, they may fail to

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*Enters., Inc. v. Holt*, 678 F.2d 936, *modified on other grounds*, 691 F.2d 989 (11th Cir. 1982) (court was part of the former Fifth Circuit); *McCabe v. Kevin Jenkins & Assocs.*, 531 F. Supp. 648 (E.D. Pa. 1982); *Gonzales v. Atlanta Constitution*, 4 Media L. Rep. (BNA) 2146 (N.D. Ill. 1979); *American Fed'n of Police v. Gordon*, 8 Media L. Rep. (BNA) 1392 (Fla. Cir. Ct. 1982); *see also Bockorny v. Midnight Publishing Corp.*, 352 F. Supp. 1093, 1094-95 (E.D. Wis. 1972).

4. The Supreme Court, at least twice before, had opportunities to deal with this issue in cases it had accepted for review. In *Polizzi v. Cowles Magazines, Inc.*, 345 U.S. 663 (1953), the Court rested its decision on interpretation of a venue statute and remanded on the issue of jurisdiction over the defendant, the publisher of *Look* magazine. Two justices stated in a separate opinion that they would have found jurisdiction because the magazine had a forum circulation of 50,000 copies and the defendant publisher had a full time agent in the forum. *Id.* at 667-70. In *New York Times, Inc. v. Sullivan*, 376 U.S. 254 (1964), the jurisdictional issue was briefed, but the Court accepted the holding of the Alabama Supreme Court that the newspaper had waived its right to challenge jurisdiction by entering a general appearance. *Id.* at 264 n.4.

5. 104 S. Ct. 1482 (1984).

6. 104 S. Ct. 1473 (1984).

7. *See infra* text accompanying notes 52-58, 77-79.

8. *See, e.g., Lewis, The Three Deaths of "State Sovereignty" and the Curse of Abstraction in the Jurisprudence of Personal Jurisdiction*, 58 NOTRE DAME LAW. 699 (1983).

9. Of course, if this occurs, it would not be the first time that lower courts overread a Supreme Court opinion and reached results beyond the technical holding of the case. Probably the most spectacular recent example of this phenomenon, one that also happens to involve the first amendment and the press, is the aftermath of the Supreme Court's foray into the closure of trials issue, starting with *Gannett Co. v. DePasquale*, 443 U.S. 368 (1979). Although the technical holding in that case was that neither the press nor the public has a sixth amendment right to attend pretrial proceedings in a criminal case, *id.* at 370, the failure of the Court to address precisely this question alone and its inclusion of considerably broader language sparked an immediate storm of hearing and trial closures. *See, e.g., Fenner & Koley, Access to Judicial Proceedings: To Richmond Newspapers and Beyond*, 16 HARV. C.R.-C.L. L. REV. 415, 416 n.12 (1981) (in seven weeks following *Gannett*, closures were enforced or upheld on appeal at an average rate of one every other day); Note, *Public Trials and a First Amendment Right of Access: A Presumption of Openness*, 60 NEB. L. REV. 169, 184-85 (1981) (describing Court-generated confusion after *Gannett* among journalists, commentators and lower courts); Paul, *Gannett v. DePasquale—What To Do About It?* in COMMUNICATIONS LAW 21, 48-70

give the press, especially those with very small or localized circulation, even the same protection as non-media defendants.<sup>10</sup>

Rather than review in great detail the development and criticisms of the *Connor* doctrine,<sup>11</sup> this Article will briefly explain the problem, consider the Supreme Court's recent opinions, and focus on the preliminary procedural protection<sup>12</sup> that remains available after *Calder* and *Keeton* to

(Practicing Law Institute 1979) (comprehensive list of court closures and closure motions after *Gannett*). The Court attempted to clarify the situation the next Term in *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980). However, the Court could not agree on a single rationale for its plurality decision that a public trial was "implicit in the guarantees of the First Amendment." *Id.* at 580; see, e.g., Note, *supra* at 186 ("myriad of rationales and qualifications"). The Court has continued to take cases in this area to clarify the "clarification." *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596 (1982) (statute mandating closure of sex-offense trial during testimony of minor victim violates first amendment); *Press-Enter. Co. v. Superior Court*, 104 S. Ct. 819 (1984) (guarantees of open public proceedings apply to *voir dire* of potential jurors in a criminal case); *Waller v. Georgia*, 104 S. Ct. 2210 (1984) (guarantees apply to suppression hearing). Although *Calder* and *Keeton* obviously have not generated a similar, immediate and explosive overreaction, the *Gannett* example is a powerful reminder of the potential for harmful results.

10. It is only fair to note, however, that the first court to decide a case after *Calder* and *Keeton* did recognize the limit of the holding. *Army Times Publishing Co. v. Watts*, 730 F.2d 1398, 1400 (11th Cir. 1984).

11. This task undoubtedly will be capably performed as new articles and comments begin to appear on this topic in response to the latest cases. The major case law development in this area has always carried a series of commentaries in its wake. See Carrington & Martin, *Substantive Interests and the Jurisdiction of State Courts*, 66 MICH. L. REV. 227 (1967); Long, *Conflicts of Law—In Personam Jurisdiction*, 55 ILL. B.J. 422 (1967); Scott, *Jurisdiction Over the Press: A Survey and Analysis*, 32 FED. COM. L.J. 19 (1980); Comment, *Minimum Contacts and the First Amendment: When Should They Meet?* 35 BAYLOR L. REV. 467 (1983) [hereinafter cited as Comment, *Minimum Contacts*]; Comment, *Long-Arm Jurisdiction Over Publishers: To Chill a Mocking Word*, 67 COLUM. L. REV. 342 (1967) [hereinafter cited as Comment, *Long-Arm Jurisdiction*]; Comment, *Nonresident Jurisdiction in Wyoming: An Analysis of Jurisdiction in Products Liability and Libel Litigation*, 11 LAND & WATER L. REV. 557, 586-601 (1976); Note, *Protecting First Amendment Rights of Defendants by Limiting Plaintiffs' Access to the Courts: Procedural Approaches to Noerr and Sullivan*, 62 MINN. L. REV. 681 (1978) [hereinafter cited as Note, *Protecting First Amendment Rights*]; Note, *Can the "Long-Arm" Reach Out-of-State Publishers?*, 43 NOTRE DAME LAW. 83 (1967) [hereinafter cited as Note, *Out-of-State Publishers*]; Note, *Constitutional Limitations to Long Arm Jurisdiction in Newspaper Libel Cases*, 34 U. CHI. L. REV. 436 (1967) [hereinafter cited as Note, *Constitutional Limitations*]; 35 FORDHAM L. REV. 726 (1967); 52 IOWA L. REV. 1034 (1967); 66 MICH. L. REV. 542 (1968); 4 SAN DIEGO L. REV. 347 (1967); 45 TEX. L. REV. 188 (1966); 20 VAND. L. REV. 921 (1967); 26 WAYNE L. REV. 263 (1979); cf. Note, *The Free Press and Its Territorial Limitations: United States Correspondents in the Soviet Courts*, 5 BROOKLYN J. INT'L L. 348, 365-72 (1979) (discussing extraterritorial jurisdiction over aliens in foreign defamation actions).

12. The focus here is on preliminary procedural protection because it is only by getting a case dismissed or transferred at a very early stage that the value of such a rule is maximized. Thus, even summary judgment may be too late because the expense of the pre-trial work needed to discover evidence to support the motion frequently will have already been incurred in the distant forum. Given that so many cases ordinarily settle or are disposed of without trial, the savings of trial expense in a distant forum may be an illusory benefit. But see, e.g., *Osmond v. EWAP, Inc.*, 153 Cal. App. 3d 842, 200 Cal. Rptr. 674, 681-82 (1984); Comment, *The Propriety of Granting Summary Judgment*

defendants who may be sued for defamation in a distant and inconvenient forum. As will be demonstrated, there are several alternatives to the rejected *Connor* doctrine that may successfully protect these defendants. These are: (1) long-arm statutes that exclude forum circulation as the basis for jurisdiction;<sup>13</sup> (2) forum circulation that does not meet the requirements for minimum contacts;<sup>14</sup> (3) lack of foreseeable injury in the forum;<sup>15</sup> (4) "second-stage balancing" in jurisdictional analysis under the due process clause;<sup>16</sup> (5) forum non conveniens;<sup>17</sup> and (6) motions to transfer in federal court.<sup>18</sup> Except for limited long-arm statutes, these approaches derive from cases that rejected the *Connor* doctrine and excluded from jurisdictional analysis any policy considerations stemming from the first amendment.<sup>19</sup> These cases retain viability because they were decided in courts that independently reached the Supreme Court's conclusion in *Calder* and *Keeton*.

## II. THE PROBLEM: THE CHILLING EFFECT ON SMALLER PUBLISHERS AND MARGINAL CIRCULATION IN DISTANT FORUMS

Why should a single group of defendants be granted special protection from an assertion of personal jurisdiction that is proper under the due process clause of the Constitution? In particular, why should members of the press, who already receive special protection in the substantive law of defamation,<sup>20</sup> be entitled to special procedural protection as well?

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for Defendants in Defamation Suits Involving Actual Malice, 26 VILL. L. REV. 470 (1981) (summary judgment favored remedy in defamation actions to avoid chilling effect of unnecessarily protracted litigation). Moreover, the Court strongly hinted in *Calder* that it would not look favorably on any modifications to summary judgment in defamation cases. *Calder*, 104 S. Ct. at 1488 (citing *Hutchinson v. Proxmire*, 443 U.S. 111, 120 n.9 (1979) as "implying that no special rules apply for summary judgment").

13. See *infra* section IV(A).

14. See *infra* section IV(B)(1).

15. See *infra* section IV(B)(2).

16. See *infra* section IV(C).

17. See *infra* section IV(D).

18. See *infra* section IV(E).

19. Thus, this Article does not include the *sui generis* first amendment doctrines developed in the courts of the District of Columbia that jurisdiction cannot arise solely from a reporter's news-gathering activities within the district, e.g., *Founding Church of Scientology v. Verlag*, 536 F.2d 429, 434 (D.C. Cir. 1976); *Margoles v. Johns*, 483 F.2d 1212 (D.C. Cir. 1973) or from contacts that implicate the first amendment right to petition the government for redress of grievances, e.g., *Naartex Consulting Corp. v. Watt*, 722 F.2d 779, 786-87 (D.C. Cir. 1983), *cert. denied*, 104 S. Ct. 2399 (1984); *Rose v. Silver*, 394 A.2d 1368, 1372-74 (D.C. 1979); cf. *Candy H. v. Redemption Ranch, Inc.*, 563 F. Supp. 505, 514 n.9 (M.D. Ala. 1983) (declining to decide whether religious activity should be protected by requiring a greater showing of contacts for personal jurisdiction to satisfy due process).

20. E.g., *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974); *New York Times, Inc. v. Sullivan*, 376 U.S. 254 (1964).

In support of the *Connor* doctrine is the concern that if publishers, especially of newspapers, face the risk of defamation actions in distant forums where the size of circulation does not justify the risk of litigation or liability, they will cut off distribution to those economically marginal areas in order to avoid the risk.<sup>21</sup> Appending first amendment considerations to jurisdictional analysis is thought to enhance the wide dissemination of publications by providing a measure of protection to prevent such marginal circulation from being threatened.<sup>22</sup> Another concern is that the publisher will avoid certain controversial or sensitive articles entirely, rather than risk a suit from an area of small circulation but great sensitivity. This chilling effect touches the publication's entire audience.<sup>23</sup>

The counter-arguments raised include: (1) a publisher who harms someone by publishing a defamatory statement that reaches a forum only through a small circulation has nevertheless caused harm that can and should be redressed in that forum state;<sup>24</sup> (2) the *Connor* doctrine is over-inclusive because it effectively protects an article alleged to be defamatory before the court decides whether it is entitled to such protection;<sup>25</sup> (3) major changes in the substantive law of libel<sup>26</sup> provide adequate protection to first amendment values and make it unnecessary to provide addi-

21. *E.g.*, *Connor*, 365 F.2d at 572. It has been long recognized that the risk of any libel action might chill the dissemination of small newspapers and magazines. *See, e.g.*, Prosser, *Interstate Publication*, 51 MICH. L. REV. 959, 969-70 (1953); Donnelly, *The Right of Reply: An Alternative to an Action for Libel*, 34 VA. L. REV. 867, 878 (1948). "The smaller journals, struggling along on subsidies or barely managing on their own, are highly vulnerable to libel suits whereas the large enterprises either have no crusading spirit or else can stand the expense of litigation." *Id.* That author also observed, "[t]here are forces in our society to whom the funds are available to accomplish this purpose and the technique of annoyance—even if all cases are lost by the plaintiffs—is not without value to those who fear the press." *Id.* For more recent observations in a similar vein, see *Sprouse v. Clay Communication, Inc.*, 211 S.E.2d 674, 690-91 (W. Va.), *cert. denied*, 423 U.S. 882 (1975) (legal fees for defending defamation actions may be "repressive" for small newspapers); E. PELL, *THE BIG CHILL* 166-68 (1984) (describing organizations, such as Synanon, the Church of Scientology, and the Unification Church, with formal policies of suing the press); Franklin, *Good Names and Bad Law: A Critique of Libel Law and a Proposal*, 18 U.S.F.L. REV. 1, 14-18 (1983) (discussing danger of self-censorship); Note, *In Defense of Fault in Defamation Law*, 88 YALE L.J. 1735, 1743 n.39 (1979) (providing examples of self-censorship); *cf.* *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 610-11 n.40 (1976) (Brennan, J., concurring in judgment) (legal expenses from opposing attempt to impose prior restraint render "obedient silence" only alternative for small-town newspapers).

22. *New York Times Co. v. Connor*, 365 F.2d 567, 573 (5th Cir. 1966). Note, *Out-of-State Publishers*, *supra* note 11, at 94.

23. 66 MICH. L. REV. 542, 548-49 (1968).

24. *E.g.*, Currie, *The Growth of the Long Arm: Eight Years of Extended Jurisdiction in Illinois*, 1963 U. ILL. L.F. 533, 552-54.

25. *E.g.*, Note, *Protecting First Amendment Rights*, *supra* note 11, at 701-02; Note, *Constitutional Limitations*, *supra* note 11, at 445. *But see* Scott, *supra* note 11, at 34-36.

26. *E.g.*, *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974); *New York Times, Inc. v. Sullivan*, 376 U.S. 254 (1964).

tional protection at an early procedural stage;<sup>27</sup> and (4) special protection for defamation defendants necessarily imposes unfair burdens on defamation plaintiffs, who are deprived of their forum of choice and must litigate in a distant location.<sup>28</sup>

However, does anyone really believe that the publisher of the *Wall Street Journal* will stop distributing the national edition of that paper by satellite transmission because of a potential libel suit somewhere, sometime? Does anyone really have to be concerned with where the publishers of the *National Enquirer* or *Hustler* have to defend the contents of their magazines? The answer is obviously no. Publishers with nationally circulated publications will not be chilled from attempting to sell their product wherever there are willing buyers. The courts have never contended that they need complete protection.<sup>29</sup>

The more significant problem rests with newspapers and magazines of any size that have a small circulation outside of their primary service area. For larger publications, such as the *Atlanta Constitution* or the *Detroit Free Press*, which do not make a great effort to achieve national circulation, but do sell some copies in distant places, the problem is not that their existence is threatened by the expense of litigation, but that they will curtail circulation in marginal areas rather than accept the risk of expensive litigation in a distant forum. For publishers whose circulation in a distant forum is relatively minuscule, either because the enterprise is small or because its circulation is essentially confined to a limited geographic area, even the threat of litigation in a distant place has a chilling effect real enough to merit some protection at a preliminary stage of litigation.<sup>30</sup> These are the very journals most vulnerable to an over-reaction

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27. E.g., *Church of Scientology v. Adams*, 584 F.2d 893 (9th Cir. 1978); 52 IOWA L. REV. 1034, 1041 (1967).

28. E.g., Note, *Protecting First Amendment Rights*, *supra* note 11, at 701-02; Note, *Constitutional Limitations*, *supra* note 11, at 447 & n.50. But see Scott, *supra* note 11, at 34 n.76.

29. For example, the Fifth Circuit itself, in later cases, has made it clear that *Connor* does not preclude suing a publisher in a distant forum. It has stated repeatedly that the import of *Connor* is to acknowledge that first amendment considerations are merely a relevant factor in analyzing personal jurisdiction. See *Rebozo v. Washington Post Co.*, 515 F.2d 1208, 1214-16 (5th Cir. 1975); *Edwards v. Associated Press*, 512 F.2d 258, 266-67 (5th Cir. 1975); *Curtis Publishing Co. v. Golino*, 383 F.2d 586, 589-94 (5th Cir. 1967) (all permitting exercise of personal jurisdiction over media defendant in defamation action brought in a distant forum).

30. See *Steaks Unlimited, Inc. v. Deaner*, 623 F.2d 264, 280 n.76 (3d Cir. 1980); *Developments in the Law—State-Court Jurisdiction*, 73 HARV. L. REV. 909, 911 (1960). Since there is no realistic prospect that the courts will adopt fee shifting as a protective measure, preliminary procedural devices that have already been recognized in the courts are the only feasible alternative. But see Note, *Protecting First Amendment Rights*, *supra* note 11, at 705-13 (advocating fee shifting). Although the availability of insurance for the cost of defense and adverse judgments may somewhat mitigate the chilling effect, the fact that the cost of insurance is location-sensitive means that it should matter to



to *Calder* and *Keeton* in the lower courts.

The premise that changes in substantive libel law are adequate bulwarks against any chilling effect on these journals ignores the substantial cost of litigation for even a victorious defendant.<sup>31</sup> Litigation in a distant forum only exacerbates the cost.

A perfect example of the problem, illustrating that not only the giants of publishing risk expensive litigation far from their home base, is presented in *McCabe v. Kevin Jenkins and Associates*.<sup>32</sup> In *McCabe*, the plaintiff attempted to force a small San Francisco based magazine, *Boulevards*, to defend itself in Pennsylvania on the basis of forum circulation of six to nine copies out of a total circulation of five thousand per month.<sup>33</sup> For this three person publishing operation, which sustained net losses of more than \$25,000 over a three year period,<sup>34</sup> the additional expense of litigating in a distant forum easily might have had a substantial chilling effect on its future activities.<sup>35</sup> In dismissing the case for lack of personal jurisdiction, the trial judge stated that without the first amendment considerations, he would have had an "extremely close question" under due process.<sup>36</sup> After *Calder* and *Keeton*, however, it is not clear how the judge would have ruled on the motion to dismiss. The same judge, faced with identical facts, but with the addition of the Supreme Court's strongly-worded new opinions, might have ruled that the publisher had to defend itself in Pennsylvania. Publishers such as this one could be harmed if lower courts read *Calder* and *Keeton* too broadly or if they ignore or re-

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publishers where they may be sued. See Franklin, *Winners and Losers and Why: A Study of Defamation Litigation*, 1980 AM. B. FOUND. RESEARCH J. 455, 494-96. In any event, the smallest and most vulnerable publishers are the least likely to be able to afford or to qualify for defamation insurance. Ek, *Libel Insurance* in H. NELSON & D. TEETER, LAW OF MASS COMMUNICATIONS 666, 670-73 (2d ed. 1973). See generally Franklin, *What Does "Negligence" Mean in Defamation Cases*, 6 COMM.-ENT. L.J. 259, 274-76 (1984) (concluding that a chilling effect may exist with or without libel insurance); Franklin, *supra* note 21, at 18-22 (same); Hanson, *The Affects [sic] of Insurance Coverage in Newspaper Libel Law* 331, and Worrall, *The Insurance Issue and Identifying Problem Areas of Libel Litigation* 251, in LIBEL LITIGATION (Practicing Law Institute, 1979). The insurance situation has been affected by recent changes in the cost of coverage. In 1984, libel insurance rates were doubled for most newspapers, and the carriers now are requiring the insured to pay twenty percent of the legal costs beyond the deductible. The deductibles are also going up substantially. New York Times, Oct. 16, 1984, at B-4.

31. E.g., Anderson, *Libel and Press Self-Censorship*, 53 TEX. L. REV. 422, 435-38 (1975); Note, *Protecting First Amendment Rights*, *supra* note 11, at 690-91; 66 MICH. L. REV. 542, 549-50 (1968).

32. 531 F. Supp. 648 (E.D. Pa. 1982).

33. *Id.* at 653.

34. See *id.* at 651.

35. See Franklin, *supra* note 21, at 17-18 (discussing practical impact of defending libel action in a distant city on a publication with a tiny staff).

36. 531 F. Supp. at 654.

ject the procedural protections to be reviewed here.

With this understanding of the scope of the problem courts and commentators have recognized in the past, it is appropriate to examine the Supreme Court's rejection of the *Connor* doctrine.

### III. THE SUPREME COURT REJECTS FIRST AMENDMENT CONSIDERATIONS

#### A. *Calder v. Jones*

In *Calder*, Shirley Jones and Marty Ingels, television and film stars, filed suit after the *National Enquirer* published an unfavorable article concerning them.<sup>37</sup> The plaintiffs sued for libel in a California trial court after the defendants failed to comply with a demand for a retraction of the article.<sup>38</sup> The defendants were the National Enquirer, Inc., a Florida corporation, Iain Calder, the magazine's editor, and John South, a reporter for the *National Enquirer* and the author of the article.<sup>39</sup>

Although the publishing corporation did not contest jurisdiction in California, Calder and South made special appearances and moved to quash service of process on the ground that the court lacked personal jurisdiction over them.<sup>40</sup> The trial court granted the motion to quash because the totality of the defendants' contacts was insubstantial and because "First Amendment considerations should be weighed in the balance of fundamental fairness."<sup>41</sup> On appeal, the California Court of Appeal reversed.

The Court of Appeal rejected the contention that the first amendment granted a special preference to the media in deciding questions of in personam jurisdiction.<sup>42</sup> Applying "traditional principles unaffected by First Amendment considerations,"<sup>43</sup> the court found that California did not have general jurisdiction over Calder and South because their activities in California were not "extensive, wide-ranging, substantial, continuous or

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37. The article stated that Ingels had "terrorized his staff, cheated stars, outraged advertisers and scandalized Hollywood," and that Jones had "been driven to drink" by this "bizarre behavior." Brief for Appellants at 2, *Calder v. Jones*, 104 S. Ct. 1482 (1984).

38. *Jones v. Calder*, 138 Cal. App. 3d 128, 130, 187 Cal. Rptr. 825, 827 (1982), *aff'd*, 104 S. Ct. 1482 (1984). Under California law, a plaintiff must demand a retraction in order to be eligible to recover general and exemplary damages. CAL. CIV. CODE § 48a (West 1982). Ingels later dismissed his complaint voluntarily. 104 S. Ct. at 1484 n.1.

39. 138 Cal. App. 3d at 130.

40. 104 S. Ct. at 1485.

41. 138 Cal. App. 3d at 131 (quoting trial court memorandum of decision). In writing for the unanimous Supreme Court, however, Justice Rehnquist stated that the trial court had concluded that the actions of Calder and South "would ordinarily be sufficient to support an assertion of jurisdiction over them in California." 104 S. Ct. at 1485.

42. 138 Cal. App. 3d at 132.

43. *Id.*

systematic.”<sup>44</sup> However, jurisdiction could be validly based on the allegation that Calder and South intended to create a tortious effect within the state on the basis of acts or omissions outside the forum state.<sup>45</sup>

After finding that South and Calder had the requisite minimum contacts with California and that the cause of action was sufficiently related to these contacts, the Court of Appeal balanced the inconvenience to the defendants against the interest of the plaintiffs in suing in the chosen forum and the “interrelated interest of the state in assuming jurisdiction.”<sup>46</sup> In balancing these considerations, the court noted that much of the evidence was in California because that was where the causes of action arose, where the plaintiffs resided and worked, and where they were most seriously damaged. The court pointed out that two of the people who furnished material for the article resided in California.<sup>47</sup> In addition, because the National Enquirer, Inc. had not contested jurisdiction, Calder and South could expect to be present as witnesses for their employer regardless of whether the trial court assumed jurisdiction over them. The Court of Appeal commented that if the plaintiffs could not sue Calder and South in California, they probably would sue them in Florida, resulting in multiple litigation and possible conflicting results. Finally, the court noted that the tort actions brought against South were directly related to and arose out of his conduct in California. Thus, the court concluded that it was fair and reasonable to subject Calder and South to jurisdiction in California.<sup>48</sup>

The Supreme Court of the United States affirmed the decision of the California appellate court. Writing for a unanimous Court, Justice Rehnquist found that California was the focal point of both the story and the harm suffered. Therefore, jurisdiction over Calder and South based on their conduct outside California was proper because of the conduct’s expected effect within the forum.<sup>49</sup> The court rejected the defendants’ contention that because they were not responsible for circulation of the article in California, they were not amenable to jurisdiction. It rejected this contention because the defendants were not charged with “mere un-

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44. *Id.* at 133.

45. *Id.* at 134. The state appellate court held that South also had other contacts with California sufficient to support a finding of personal jurisdiction over him. These contacts included a trip to California in which South gathered information appearing in the article and telephone calls from Florida to California, including one to Ingels. *Id.* at 135. The Supreme Court found it unnecessary to review this alternate basis for jurisdiction. 104 S. Ct. at 1486 n.6.

46. 138 Cal. App. 3d at 136.

47. Presumably the court expected these people to be witnesses at the trial.

48. 138 Cal. App. 3d at 137.

49. 104 S. Ct. at 1486-87.

targeted negligence," but with intentional actions expressly aimed at California.<sup>50</sup> Knowing that the brunt of the injury would be felt by Jones in California, the state where she lives and works and where the *National Enquirer* has its largest circulation, the Court concluded that the defendants must have reasonably anticipated being haled into court in California to answer for the truth of the article.<sup>51</sup>

Most importantly for present purposes, the Court rejected the contention that first amendment concerns should enter into jurisdictional analysis.<sup>52</sup> This rejection was short and direct: The Court neither analyzed, nor cited, any of the lower court cases decided over nearly twenty years either supporting<sup>53</sup> or questioning<sup>54</sup> this concept. The Court stated that such an infusion "would needlessly complicate an already imprecise inquiry,"<sup>55</sup> and that the potential chill on protected activity was already accounted for in the substantive law of defamation.<sup>56</sup> According to Justice Rehnquist, raising these concerns at the jurisdictional stage "would be a form of double counting."<sup>57</sup> Finally, the Court noted it had already declined to grant special procedural protection to defamation defendants in other contexts.<sup>58</sup> The Court ended its opinion without reviewing the balancing the lower state court had said was necessary as a second stage in determining the propriety of the exercise of jurisdiction.

### B. *Keeton v. Hustler Magazine, Inc.*

In the companion case to *Calder*, released the same day, the Supreme

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50. *Id.* at 1487.

51. *Id.* (quoting *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980)). Soon after the decision was announced, the parties settled out of court for a retraction and an undisclosed sum. 10 MEDIA L. REP. (BNA) No. 19 (1984).

52. 104 S. Ct. at 1487.

53. *E.g.*, *Cox Enters., Inc. v. Holt*, 678 F.2d 936, *modified on other grounds*, 691 F.2d 989 (11th Cir. 1982); *New York Times Co. v. Connor*, 365 F.2d 567 (5th Cir. 1966).

54. *E.g.*, *Church of Scientology v. Adams*, 584 F.2d 893, 899 (9th Cir. 1978); *Anselmi v. Denver Post, Inc.*, 552 F.2d 316, 324 (10th Cir.), *cert. denied*, 432 U.S. 911 (1977); *Buckley v. New York Post Corp.*, 373 F.2d 175 (2d Cir. 1967).

55. 104 S. Ct. at 1487 (citing *Estin v. Estin*, 334 U.S. 541, 545 (1948)).

56. *Id.* at 1488 (citing *New York Times, Inc. v. Sullivan*, 376 U.S. 254 (1964); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974)).

57. 104 S. Ct. at 1488-89.

58. *Id.* (citing *Herbert v. Lando*, 441 U.S. 153 (1979); *Hutchinson v. Proxmire*, 443 U.S. 111, 120 n.9 (1979)). Because of the timing of the release of the decisions, Justice Rehnquist was not required to explain how this statement comported with the Court's holding in an opinion released just six weeks later that the preservation of precious liberties protected by the first amendment required the special procedure of independent appellate scrutiny of a finding of actual malice in a defamation action brought against a media defendant. *Bose Corp. v. Consumers Union, Inc.*, 104 S. Ct. 1949, 1965 (1984). Justice Rehnquist dissented from the majority opinion. *Id.* at 1967.

Court rejected out of hand the concept of including first amendment considerations in jurisdictional analysis. Compared to its analysis in *Keeton*, the Court's conclusory statements on the concept in *Calder* are a multi-volume treatise.

In *Keeton*, the plaintiff brought a defamation action against the corporate publisher of *Hustler* and other defendants in federal court in New Hampshire.<sup>59</sup> Even though she was a resident of New York and *Hustler* was published by an Ohio corporation, Keeton sued in New Hampshire because it was the only state where her action was not barred by the statute of limitations.<sup>60</sup> In response to a motion to dismiss, the federal district court and a panel of the First Circuit held that the extension of New Hampshire's long-arm statute to these defendants violated due process.<sup>61</sup>

The First Circuit found that the defendants' circulation of magazines in New Hampshire would have been sufficient to support a suit by a New Hampshire resident for libel occurring in New Hampshire.<sup>62</sup> However, the court concluded that because the plaintiff sought far more damages for harm occurring outside New Hampshire than inside, it was unfair for her to maintain the suit in New Hampshire on the basis of the minimal

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59. The alleged libel was a cartoon published in *Hustler* in 1976 suggesting that Bob Guccione, publisher of rival *Penthouse Magazine*, had infected Keeton with a venereal disease. Brief for Petitioner at 2, *Keeton v. Hustler Magazine, Inc.*, 104 S. Ct. 1473 (1984). At the time, Keeton was his common-law wife and a vice-president of *Penthouse*. *San Francisco Chron.*, Nov. 9, 1983, at 20.

60. 104 S. Ct. at 1477. The suit previously had been dismissed in Ohio because the causes of action were barred by the applicable statute of limitations. *Id.* at 1477 n.1. At the time the suit was filed, the applicable statute of limitations in New Hampshire was six years. N.H. REV. STAT. ANN. § 508:4 (1968). After this action was filed, the statute was revised to permit personal actions for slander or libel in the future only within three years of accrual. N.H. REV. STAT. ANN. § 508:4(II) (Supp. 1983).

61. 104 S. Ct. at 1477.

62. *Keeton v. Hustler Magazine, Inc.*, 682 F.2d 33, 34 (1st Cir. 1982), *rev'd*, 104 S. Ct. 1473 (1984). The district court found that the corporation had sent magazines to independent distributors for New Hampshire. Circulation in the state amounted to less than one percent of total circulation in the United States. *Id.* at 33. The Court of Appeals did not, however, compare this figure to New Hampshire's portion of the total population of the United States. The 1980 census data show that New Hampshire's population was 0.3% of the total population of the United States. STATISTICAL ABSTRACT OF THE UNITED STATES: 1984, at 11 (104th ed. 1983). Other courts have made the comparison explicit. *E.g.*, *Samad v. High Society Magazine*, 10 MEDIA L. REP. (BNA) 1930, 1931-32 (D.V.I. 1984) (jurisdiction found—275 copies per month, constituting .0567% of the total sales, where forum population was .0435% of total population of United States); *Schwegmann Bros. Giant Super Markets, Inc. v. Pharmacy Reports, Inc.*, 486 F. Supp. 606, 609-12 (E.D. La. 1980) (jurisdiction found—result based upon forum-state circulation of 77 copies per week, constituting 1.75% of national circulation, where forum-state population constituted approximately 1.8% of total population of United States); *Johnston v. Time, Inc.*, 321 F. Supp. 837, 845 (M.D.N.C. 1970) (1.7% of total circulation of *Sports Illustrated* "compares favorably" with forum's 2.5% share of national population after taking into account foreign circulation and forum's relative lack of affluence).

contacts afforded by *Hustler's* forum circulation.<sup>63</sup> The court noted that the state had no special interest in protecting a nonresident such as Keeton from damages to her reputation caused by activities that had occurred outside of New Hampshire and had caused injury outside of the state.<sup>64</sup> The court also reasoned that allowing the multistate defamation action to go forward in New Hampshire would thwart the policies of all of the other states, in particular the defendants' home states, by exposing the defendants to the risk of suit for nationwide damages long after the statutes of limitations of all but one state had expired. Therefore, New Hampshire's small interest in compensating the nonresident plaintiff for any injury she may have suffered in New Hampshire was outweighed by these other policies.<sup>65</sup> The First Circuit concluded, "the New Hampshire tail is too small to wag so large an out-of-state dog."<sup>66</sup>

In a unanimous result, the Supreme Court reversed the First Circuit panel.<sup>67</sup> Justice Rehnquist, writing for the Court, held that the defendants' "regular circulation of magazines in the forum State is sufficient to support an assertion of jurisdiction in a libel action based on the contents of the magazine."<sup>68</sup> The Court stated that it was unquestionable that assertion of jurisdiction in this case would ordinarily satisfy the due process requirement of minimum contacts because, "regular monthly sales of thousands of magazines cannot by any stretch of the imagination be characterized as random, isolated, or fortuitous."<sup>69</sup>

The Court rejected the Court of Appeal's conclusion that other concerns led to a different result. First, the Court found that it was fair to compel the defendant to defend a multi-state libel action in New Hampshire because of that state's significant interest in redressing harms that have occurred within the state.<sup>70</sup> The Court noted that the false statements of fact, which are the predicate for a libel action, harm both the subject of the falsehood and those who read them. Thus, New Hampshire was protecting its own citizen-readers from deception and could also legitimately protect the reputation of a non-resident in the state even where the plaintiff was previously unknown there.<sup>71</sup> The Court recognized New

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63. 682 F.2d at 35.

64. *Id.*; accord, *Curtis Publishing Co. v. Birdsong*, 360 F.2d 344, 347 (5th Cir. 1966).

65. 682 F.2d at 36.

66. *Id.*

67. *Keeton*, 104 S. Ct. at 1477.

68. *Id.* at 1478.

69. *Id.* The Court previously stated that 10,000-15,000 copies of *Hustler* were sold in New Hampshire every month. *Id.* at 1477. Compare *supra* note 62.

70. *Id.* at 1479.

71. *Id.* The libel could create a negative reputation in a jurisdiction where plaintiff's previous reputation had been small, but unblemished. *Id.* In a footnote, the Court pointed out that the fact

Hampshire's substantial interest in cooperating with other states through the single publication rule<sup>72</sup> to provide a forum for efficiently litigating all issues and claims arising out of the alleged libel.<sup>73</sup> Thus, New Hampshire's interest in redressing injuries within the state and its interest in cooperating with other states made New Hampshire an appropriate forum for the multi-state libel action.<sup>74</sup> The Court of Appeal's finding of an element of unfairness because of New Hampshire's especially long statute of limitations was rejected as irrelevant to the issue of personal jurisdiction. Such a choice of law concern, the Court stated, "does not alter the jurisdictional calculus."<sup>75</sup>

The Court also rejected the First Circuit's reasoning that the plaintiff's contacts with the forum were critical. The Court explicitly stated that plaintiff's residence in the forum is not a separate jurisdictional requirement, although it may play a role in enhancing defendant's forum contacts.<sup>76</sup>

The first amendment issue was relegated to a footnote in which Justice Rehnquist delivered what was evidently intended to be the *coup de grace* to the *Connor* doctrine: "[W]e reject categorically the suggestion that invisible radiations from the First Amendment may defeat jurisdiction oth-

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that Keeton's name regularly appeared in fine print in copies of *Penthouse* circulating in the state was expressly not the basis for this holding. *Id.* at 1479 n.5. The evident effect of this footnote is to promote forum shopping by forestalling the limitation of the potentially broad application of this concept only to those situations where the plaintiff is similarly "known" in the jurisdiction.

72. The Restatement defines the single publication rule as follows:

As to any single publication, (a) only one action for damages can be maintained; (b) all damages suffered in all jurisdictions can be recovered in the one action; and (c) a judgment for or against the plaintiff upon the merits of any action for damages bars any other action for damages between the same parties in all jurisdictions.

RESTATEMENT (SECOND) OF TORTS § 577A(4) (1977).

73. 104 S. Ct. at 1480.

74. In reviewing New Hampshire's interest in exercising jurisdiction, Justice Rehnquist noted that: "[i]nsofar as the State's 'interest' in adjudicating the dispute is a part of the Fourteenth Amendment due process equation, as a surrogate for some of the factors already mentioned, see *Insurance Corp. v. Compagnie des Bauxites*, 456 U.S. 694, 702-703 n.10 . . . (1982), we think the interest is sufficient." *Id.* at 1479. Justice Brennan, concurring in the judgment, noted that under *Insurance Corp.*, the forum state's interest in enforcing its own substantive libel law or statute of limitations was not relevant to the question of the adequacy of the contacts between the defendant and the forum for due process purposes. *Id.* at 1482. It is beyond the scope of this short Article to analyze the implications of Justice Rehnquist's reading of the *Insurance Corp.* footnote for personal jurisdiction analysis in general. For discussion of the implications of the *Insurance Corp.* footnote, see, e.g., Drobak, *The Federalism Theme in Personal Jurisdiction*, 68 IOWA L. REV. 1015 (1983); Lewis, *A Brave New World for Personal Jurisdiction: Flexible Tests Under Uniform Standards*, 37 VAND. L. REV. 1 (1984); Lewis, *supra* note 8; 69 CORNELL L. REV. 136 (1982).

75. 104 S. Ct. at 1480.

76. *Id.* at 1481.

erwise proper under the Due Process Clause.”<sup>77</sup> His opinion concluded with the observation that because of its continuous and deliberate exploitation of the market of the forum, *Hustler’s* publisher could anticipate being haled into court in a libel action based on the contents of the magazine.<sup>78</sup> Moreover, by charging the defendant with knowledge of the single publication rule adopted by New Hampshire, the Court held that the defendant could anticipate that nationwide damages might be sought there. Therefore, there was no unfairness in requiring the publishing corporation to answer for the contents of the magazine “wherever a substantial number of copies are regularly sold and distributed.”<sup>79</sup>

### C. Analysis of *Calder and Keeton*

As stated previously, the intent of this Article is to accept the reality of the Court’s strong rejection of the *Connor* doctrine and to assess what a media defendant might do to protect itself from an unfair assertion of jurisdiction in the face of the *Calder* and *Keeton* opinions. Nevertheless, a few comments on the holdings are in order.<sup>80</sup> For present purposes, the major problem with the opinions is not the results reached under the particular facts, but the conclusory nature of the reasoning that the Court used to justify its position. For example, the Court did not explain why the first amendment concerns would, in fact, “needlessly complicate an already imprecise inquiry.”<sup>81</sup> The citation used as the sole support for this statement, *Estin v. Estin*,<sup>82</sup> has been used in the past simply as an acknowledgement that personal jurisdiction is a complicated matter in which many factors come into play.<sup>83</sup>

The Court also did not analyze why the substantive law of defamation

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77. *Id.* at 1481 n.12.

78. *Id.* at 1481.

79. *Id.* at 1482.

80. If past experience is any guide, other commentators will review the development and ultimate rejection of the *Connor* doctrine. For examples of commentators previously supporting the *Connor* doctrine, see Carrington & Martin, *supra* note 11, at 240-42; Comment, *Minimum Contacts*, *supra* note 11, at 493-95; Note, *Out-of-State Publishers*, *supra* note 11, at 93-96; 66 MICH. L. REV. at 548-49. For examples *contra*, see Currie, *supra* note 24, at 552-54; Note, *Protecting First Amendment Rights*, *supra* note 11, at 699-705; Comment, *Long-Arm Jurisdiction*, *supra* note 11, at 354-64; Note, *Constitutional Limitations*, *supra* note 11, at 440-46.

81. *Calder*, 104 S. Ct. at 1487.

82. 334 U.S. 541, 545 (1948), *cited in Calder*, 104 S. Ct. at 1487-88.

83. *Estin* was a divorce case deciding an issue under the full faith and credit clause of the United States Constitution. In that context, the *Estin* Court observed: “[T]here are few areas of the law in black and white. The greys are dominant and even among them the shades are innumerable.” *Estin*, 334 U.S. at 545. Before *Calder*, the Court previously had quoted that statement in one personal jurisdiction case, *Kulko v. Superior Court*, 436 U.S. 84, 92 (1978), and Justice Brennan had quoted it in dissent in another. *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 310 n.16 (1980).



was adequate to protect against the potential chilling effect and why special procedural protection was never required. This was a curious oversight because the Court was simultaneously preparing an opinion holding to the contrary.<sup>84</sup>

It would have been helpful to lower courts and to litigants if the Court had provided guidelines for dealing with the recurring factual situations in this area. It is neither surprising nor troublesome that a nationally circulated magazine such as *Hustler*, which had successfully exploited the commercial market of the forum,<sup>85</sup> could reasonably anticipate being haled into court on the basis of its circulation there. However, the Supreme Court made no attempt to explain when a publication's circulation might not be "regular,"<sup>86</sup> or "substantial,"<sup>87</sup> or when it could "be characterized as random, isolated or fortuitous,"<sup>88</sup> and, therefore, entitled to protection under the due process clause.

Finally, the Court failed to analyze completely the jurisdictional issue in *Calder*. Although the lower court had considered foreseeable effects and had balanced a variety of other factors, the Court only assessed the effects issue. Ignoring the lower court's balancing of other factors continues to leave the viability of that approach in doubt.<sup>89</sup>

These failures are inconsistent with the Court's tradition in personal jurisdiction opinions of outlining a complete approach that anticipates the various situations that the lower courts might encounter.<sup>90</sup> The lack of guidance is, however, consistent with the tone of Justice Rehnquist's analysis of this issue. The opinions convey the impression that the idea that first amendment considerations belong in jurisdictional analysis is not only rejected, but also that it is not to be taken seriously.<sup>91</sup> This air of mockery, combined with the lack of guidance and with the tendency of courts to decide jurisdictional questions in favor of their own power over defendants, may lead to an overreaching of the limits of the *Calder* and *Keeton*

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84. See *supra* note 58.

85. See *supra* note 62.

86. *Keeton*, 104 S. Ct. at 1478.

87. *Id.* at 1481.

88. *Id.* at 1482.

89. Cf. *Burstein v. State Bar of California*, 693 F.2d 511, 518 n.12, 521 n.15 (5th Cir. 1982) (applying although questioning, continuing viability of, two-stage analysis after *Insurance Corp. of Ireland v. Compagnie des Bauxites de Guinee*, 456 U.S. 694 (1982)). For further discussion, see *infra* section IV(C).

90. See, e.g., *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 291-94 (1980); *Shaffer v. Heitner*, 433 U.S. 186, 196-212 (1977); *International Shoe Co. v. Washington*, 326 U.S. 310, 316-19 (1945).

91. Accordingly, in *Keeton*, Justice Rehnquist characterized the concept as "the suggestion that invisible radiations from the First Amendment may defeat jurisdiction." 104 S. Ct. at 1481 n.12.

holdings. For this reason, it is useful to consider other preliminary approaches to protecting defamation defendants from assertions of jurisdiction, particularly within the context of decisions that cannot be said to be limited by or invalidated under *Calder* and *Keeton*.

#### IV. ALTERNATIVE PRELIMINARY PROCEDURAL PROTECTION

##### A. Long-Arm Statutes

The starting point, of course, in any jurisdictional analysis is the long-arm statute of the forum state. The reach of the long-arm statute will usually be sufficient to allow defamation actions against out of state publishers whose contacts are based primarily upon circulation.<sup>92</sup> In a few states, however, legislatures have explicitly eliminated from their long-arm statutes jurisdiction in defamation actions based on forum circulation as a tortious act. These states include Georgia,<sup>93</sup> Minnesota,<sup>94</sup> New York,<sup>95</sup> and Connecticut.<sup>96</sup> Such statutes provide protection in limited circumstances.

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92. See Note, *Out-of-State Publishers*, *supra* note 11, at 90-93. In that Note, the author divided the types of long-arm statutes into groups, and suggested that under virtually any general statutory formulation, circulation in the forum would be sufficient to support the exercise of long-arm jurisdiction. Two of the specific examples the author gave of statutes that would not grant sufficient authority are now open to question, however. (1) The author noted that the Maryland statute provided for jurisdiction based on "liability for acts done within this State." MD. ANN. CODE art. 23, § 92 (1951). The author stated that under that statute, circulation alone would not be enough to sustain personal jurisdiction. Note, *supra* at 92 (citing *Rosenberg v. Andrew Weir Ins. Co.*, 154 F. Supp. 6 (D. Md. 1957)). The Maryland statute under consideration in the Note was repealed in 1967. 1967 Md. Laws ch. 532, § 1. Maryland's present jurisdictional statute permits the exercise of jurisdiction to the constitutional limits. MD. CTS. & JUD. PROC. CODE ANN. § 6-102 (1984). See *Smith v. Esquire, Inc.*, 494 F. Supp. 967, 969 n.3 (D. Md. 1980) (finding jurisdiction over publisher of national magazine on the basis of revenue from forum state subscriptions and newsstand sales). (2) The author also mentioned that Maine limited actions against out of state defendants to those for physical injury. Note, *supra* at 93 (citing ME. REV. STAT. ANN. tit. 14, § 704(1)(B) (1964)). In 1976, however, the Maine statute was revised, eliminating this limitation. ME. REV. STAT. ANN. tit. 14, § 704A (1975).

93. GA. CODE § 24-113.1(b)(1970). See *Process Control Corp. v. Witherup Fabrication and Erection, Inc.*, 439 F. Supp. 1284 (D. Ga. 1977); *Bradlee Management Servs., Inc. v. Cassells*, 249 Ga. 717, 292 S.E.2d 717 (1982).

94. MINN. STAT. ANN. § 543.19(1)(d)(3) (West Supp. 1984). See *Flanders v. Associated Newspapers, Ltd.*, 9 Media L. Rep. (BNA) 1669, 1671 (D. Minn. 1983); Note, *Due Process and Long-Arm Jurisdiction in Minnesota: A Criticism of the Minimum Contacts Standard*, 5 WM. MITCHELL L. REV. 287, 320-21 (1979).

95. N.Y. CIV. PRAC. LAW § 302(a)(3) (McKinney 1972). See *American Radio Ass'n v. A.S. Abell Co.*, 58 Misc. 2d 483, 296 N.Y.S.2d 21, 22 (Sup. Ct. 1968); *McLaughlin, Practice Commentary*, in N.Y. CIV. PRAC. LAW C302:18, at 86 (McKinney 1972); R. SACK, LIBEL, SLANDER, AND RELATED PROBLEMS 510-13 (1980); 1 J. WEINSTEIN, H. KORN & A. MILLER, NEW YORK CIVIL PRACTICE § 302.15, at 3-130 (1975); Weinstein, *Trends in Civil Practice*, 62 COLUM. L. REV. 1431, 1436 (1962).

96. CONN. GEN. STAT. ANN. § 52-59b (West Supp. 1979).

For example, the Supreme Court of Georgia recently held that under its long-arm statute, which excluded causes of action for defamation, a defendant was not amenable to jurisdiction under circumstances that otherwise would have suggested that jurisdiction would be proper. In *Bradlee Management Services, Inc. v. Cassells*,<sup>97</sup> the plaintiff was a corporation that managed nursing homes located in Georgia. The defendant, Cassells, a resident of Virginia, was employed by co-defendant Cox Broadcasting Corporation as chief of its bureau in Washington, D.C. The bureau provided news stories from the capital to the radio and television stations owned and operated by Cox Broadcasting throughout the country. On one occasion, Cassells attended congressional committee hearings on the elderly and prepared audio and video tapes that reported on the hearings for Cox stations. The tapes included an interview with a woman who had testified concerning abuses of elderly residents in some nursing homes in Georgia. Cassells sent the interview to the Cox television station in Atlanta. Portions of his report were used in a story broadcast on the station's evening news program. The Georgia Supreme Court held that under the Georgia statute, even though the contacts with the forum state might be sufficient to satisfy the general requirements of due process, the Georgia courts had no jurisdiction over nonresident defendants in defamation cases where there were no contacts with the forum other than the commission of the tort.<sup>98</sup>

*Cassells* illustrates that the statutory formulation does make a difference. Other courts, which did not have to apply a truncated long-arm statute, have found jurisdiction under facts analogous to *Cassells*. For example, in *Fanelli v. Body Science*,<sup>99</sup> the district court denied a motion to dismiss for lack of jurisdiction, because the non-resident defendant placed offending advertisements in at least two nationally-circulated publications that could be purchased at newsstands in the forum. Under similar facts, a district court in Connecticut found jurisdiction under that state's long-arm statute over a District of Columbia corporation that had solicited prospective franchisees through advertisements in the *Wall Street Journal*.<sup>100</sup> Finally, in a defamation action, a federal court in Pennsylvania found jurisdiction over a New York resident on the basis of statements made during an interstate telephone conversation. The defendant had spoken to a reporter in Philadelphia who was working on a story subse-

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97. 249 Ga. 717, 292 S.E.2d 717 (1982).

98. *Id.* at 719-20.

99. 540 F. Supp. 111 (E.D. Pa. 1982).

100. *McFaddin v. National Executive Search, Inc.*, 354 F. Supp. 1166 (D. Conn. 1973). Connecticut's statute has been changed since this case was decided. See *supra* note 96.

quently published with those comments in the *Philadelphia Inquirer*.<sup>101</sup> Although the call was initiated by the reporter, the court held that harm to plaintiff in the forum was foreseeable because the reporter had clearly identified her employer and location before the defendant spoke.

Even in states with specialized long-arm statutes, jurisdiction over a media defendant in a defamation case may still be exercised if there are other contacts with the forum state.<sup>102</sup> In these instances, the statute will merely protect a defendant from jurisdiction based solely on circulation or sending defamatory material into the forum.

In any event, these statutes are unaffected by the Supreme Court's holdings in *Calder* and *Keeton*. Those cases merely determined how far a long-arm statute may extend under the due process clause. It is possible, however, that the statutes in these states will now be amended to reach as far as *Calder* and *Keeton* permit, because the statutes were based directly on the now-discredited *Connor* opinion.<sup>103</sup> For the time being, however, these statutes will provide protection for defamation defendants whose only contact with those states is circulation.<sup>104</sup>

### B. Minimum Contacts

#### 1. Circulation

If the long-arm statute extends over the defendant, the next step in jurisdictional analysis is to determine whether the defendant has the requisite minimum contacts with the forum.<sup>105</sup> Although the *National En-*

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101. *Dion v. Kiev*, 566 F. Supp. 1387 (E.D. Pa. 1983). See also *Cole v. Doe*, 77 Mich. App. 183, 258 N.W.2d 165 (1977) (case with similar facts and a similar result); 26 WAYNE L. REV. 263 (1979) (student note on *Cole*).

102. See, e.g., *Davis v. Costa-Gavras*, 10 MEDIA L. REP. 2484, 2485-87 (S.D.N.Y. 1984); *Process Control Corp. v. Witherup Fabrication and Erection, Inc.*, 439 F. Supp. 1284, 1287 (N.D. Ga. 1977); *Solargen v. Newhouse Broadcasting Corp.*, 6 MEDIA L. REP. (BNA) 1656, 1657 (N.Y. Sup. Ct. 1980); *American Radio Ass'n v. A.S. Abell Co.*, 58 Misc. 2d 483, 296 N.Y.S. 2d 21 (Sup. Ct. 1968); *McLaughlin*, *supra* note 95 ("[O]f course, if there is an independent source of jurisdiction de hors this statute jurisdiction may be acquired.").

103. See *Bradlee Management Servs., Inc. v. Cassells*, 249 Ga. 717, 292 S.E.2d 717, 720 (1982); *Weinstein*, *supra* note 95, at 1436; Note, *supra* note 94, at 320. It is also possible that other legislatures will adopt similar statutes. The trend, however, has been to expand the statutorily permissible reach of jurisdiction. See *supra* note 92.

104. Although the statutes do not distinguish between large and small publishers, as a practical matter, the statutes do serve to protect primarily small non-forum publishers and marginal circulation situations, because jurisdiction is permitted under these statutes when contacts are more extensive, as would be the case for an organization large enough, or when the market was important enough, to justify an office and staff in the forum. See cases cited *supra* note 102.

105. E.g., *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 104 S. Ct. 1868, 1871-72 (1984); *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945).

quirer in *Calder*,<sup>106</sup> and *Hustler* in *Keeton*,<sup>107</sup> had minimum contacts with the forum, a court could find that the circulation of a newspaper or magazine was so minuscule that it did not constitute minimum contacts sufficient to justify the assertion of jurisdiction. A few cases prior to *Keeton* were decided on this basis.<sup>108</sup> In such circumstances, a media defendant plausibly could contend that, in contrast to *Hustler's* situation in *Keeton*, its own circulation in the forum should be "characterized as random, isolated, or fortuitous."<sup>109</sup> However, after *Keeton*, those cases in which there was at least a rough equivalence between the percentage of population and the percentage of circulation, but the courts nevertheless refused to take jurisdiction because the circulation was purportedly too small, now are clearly wrong.<sup>110</sup> Examining minimum contacts with some care, and on a basis relative to population when the forum circulation figures and revenue are comparatively small,<sup>111</sup> will provide protection to a publisher

106. 104 S. Ct. at 1484-85.

107. 104 S. Ct. at 1478.

108. *E.g.*, *Wolfson v. Houston Post Co.*, 441 F.2d 735, 736 (5th Cir. 1971) (no jurisdiction in Florida over Texas newspaper—forum advertising and circulation less than 0.16% of total); *Flanders v. Associated Newspapers, Ltd.*, 9 Media L. Rep. (BNA) 1669 (D. Minn. 1983) (no jurisdiction in Minnesota over large U.K. newspaper corporation selling 100 copies per week in U.S.); *Kersh v. Angelosante*, 8 Media L. Rep. (BNA) 1282, 1284 (N.D. Tex. 1982) (no jurisdiction in Texas over Michigan newspaper with .0047% of total circulation in forum); *Burlotos v. News*, 6 Media L. Rep. (BNA) 1986, 1987 (D.N.J. 1980) (no jurisdiction in New Jersey over two Greek newspapers—less than 1% of world-wide circulation distributed anywhere in United States); *Gonzales v. Atlanta Constitution*, 4 Media L. Rep. (BNA) 2146 (N.D. Ill. 1979) (no jurisdiction in Illinois over Georgia newspaper with less than .001% of total circulation in forum); *Sipple v. Des Moines Register & Tribune Co.*, 82 Cal. App. 3d 143, 147, 147 Cal. Rptr. 59 (1978) (no jurisdiction in California over daily newspapers from distant states with less than 0.3% circulation in forum).

109. *Keeton*, 104 S. Ct. at 1478. *Compare Church of Scientology v. Adams*, 584 F.2d 893, 897 (9th Cir. 1978) ("we do not think it consistent with fairness to subject publishers to personal jurisdiction solely because an insignificant number of copies of their newspapers were circulated in the forum state").

110. *E.g.*, *Ziegler v. Ring Publishing Corp.*, 556 F. Supp. 329 (S.D. Fla. 1982) (no jurisdiction over national magazine with "only" 3.5% of circulation in forum); *Evangelize China Fellowship, Inc. v. Evangelize China Fellowship*, 146 Cal. App. 3d 440, 194 Cal. Rptr. 240 (1983) (no jurisdiction—"only" 600 of 8,500 total world-wide circulation sent to readers in forum); *American Fed'n of Police v. Gordon*, 8 Media L. Rep. (BNA) 1392 (Fla. Cir. Ct. 1982) (no jurisdiction—"only" 5% of national circulation in forum). In 1980, Florida's population was 3.23% of the population of the United States. It has been estimated from the 1980 census figures that in 1982, the figure was 3.45%. See STATISTICAL ABSTRACT OF THE UNITED STATES: 1984, at 11 (104th ed. 1983). See Scott, *supra* note 11, at 44 (due process analysis "must focus on whether the circulation in the forum is proportional" to population).

111. For example, in construing the long-arm statute in the District of Columbia, which permits jurisdiction in a tort action over a person deriving "substantial revenue from goods used or consumed" in the forum, two courts have stated that this requirement can be met in a defamation action from forum circulation based on an absolute dollar amount or on a percentage of sales. *Founding Church of Scientology v. Verlag*, 536 F.2d 429, 433 (D.C. Cir. 1976) (finding jurisdiction in District of Columbia based on sales of \$26,000 in ten months constituting 1% of gross revenues of New York

whose market penetration is practically nil or marginal. In these extreme cases, truly marginal circulation will be afforded the protection that it deserves.

## 2. Foreseeable Injury

Where the circulation is so small in proportion to population that arguably the required minimum contacts cannot be based on the minuscule figures, a media defendant may also contend that jurisdiction is improper because the defendant could not have foreseen that the plaintiff would have been injured in the forum. The leading case adopting this approach is *Church of Scientology v. Adams*.<sup>112</sup>

The California Church of Scientology brought a libel action in California against the publisher of the *St. Louis Post-Dispatch* on the basis of a five part series published in the newspaper about Scientology in general and the local Missouri Church of Scientology in particular. The California church was not mentioned in any of the articles. Although the Ninth Circuit in *Adams* questioned the idea that first amendment considerations belonged in the initial analysis of jurisdiction,<sup>113</sup> it recognized that the unique qualities of the media precluded finding jurisdiction on the basis of small, fortuitous circulation. The Ninth Circuit reasoned it was more consistent with due process to base jurisdiction on the question of the foreseeability of an injury by defamation in the forum. In contrast to a products liability case, where "[i]t is assumed . . . that the locus of the risk of injury is the situs of the product,"<sup>114</sup> the court concluded that in a defamation case the appropriate question to ask was whether a risk of defamation in the forum was foreseeable.<sup>115</sup>

Under the facts in *Adams*, the court held that it was not reasonably foreseeable that any risk of defamation would arise from circulation in the forum. California events were not the topic of the articles. California readers were not a principal or even secondary target of the articles. The plaintiff was not mentioned in any of the articles; at best, one article referred to "three hundred branches" of the Scientology movement and the articles concerned Scientology in general.<sup>116</sup>

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corporation); *Akbar v. New York Magazine Co.*, 490 F. Supp. 60, 65 (D.D.C. 1980) (finding jurisdiction in District of Columbia over New York corporation based on \$33,000 of annual sales constituting 0.7% of total circulation).

112. 584 F.2d 893 (9th Cir. 1978).

113. *Id.* at 899.

114. *Id.* at 897.

115. *Id.*

116. *Id.* at 898.

The foreseeability test has been applied in defamation actions by other courts<sup>117</sup> as well as by the Ninth Circuit.<sup>118</sup> Lack of specific foreseeability was crucial to the Supreme Court in its 1980 opinion in *World-Wide Volkswagen*,<sup>119</sup> and should still be available as a jurisdictional defense despite *Keeton* and *Calder*. In each case, the harm to the plaintiff was foreseeable: in *Keeton*, the defamatory material, a cartoon, referred clearly to the plaintiff; in *Calder*, the plaintiffs were named in the article.

When *Calder* and *Keeton* are viewed together, however, the lack-of-foreseeability defense may have been eliminated or its utility reduced in defamation actions. In *Calder*, the Court concluded that the defendant reporter and editor could have readily foreseen injury to the plaintiff because they knew that the article they were writing would injure the reputation of its subject, the plaintiff. Furthermore, they knew that the injury foreseeably would occur in the forum, which was the plaintiff's home state and the largest circulation market of the *National Enquirer*. This is obviously a strong case for the application of the foreseeable effects test as the basis of jurisdiction. However, in *Keeton*, a case that ostensibly rests jurisdiction on minimum contacts analysis, the Court went out of its way to indicate that New Hampshire was entitled to protect non-resident Keeton's small, but previously unblemished, reputation within the state.<sup>120</sup> Combining *Calder* and *Keeton*, and assuming that the publisher should have reasonably recognized that it was referring to the plaintiff in the allegedly defamatory article,<sup>121</sup> a court could conclude that harm to anyone's nominal reputation in any forum where the publisher was aware of

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117. *E.g.*, *Anselmi v. Denver Post, Inc.*, 552 F.2d 316, 325 (10th Cir.), *cert. denied*, 432 U.S. 911 (1977); *Dion v. Kiev*, 566 F. Supp. 1387 (E.D. Pa. 1983); *McCabe v. Kevin Jenkins & Assocs., Inc.*, 531 F. Supp. 648, 653 (E.D. Pa. 1982); *Burlotos v. News*, 6 Media L. Rep. (BNA) 1986, 1988 (D.N.J. 1980); *Heilig v. Superior Court*, 149 Cal. App. 3d 978, 197 Cal. Rptr. 190 (1983), *cert. denied*, 104 S. Ct. 2336 (1984); *see also* *Paolino v. Channel Home Centers*, 668 F.2d 721, 724 (3d Cir. 1981) (minimum contacts analysis inapplicable to cases in which defendant's forum-related conduct caused the harm; in such cases, specific foreseeability is the applicable test); *Von Mehren & Trautman, Jurisdiction to Adjudicate: A Suggested Analysis*, 79 HARV. L. REV. 1136, 1144-64 (1966).

118. *Demaris v. Greenspun*, 712 F.2d 433, 434 (9th Cir. 1983) (no jurisdiction in California over Las Vegas newspaper with less than 1.3% of circulation in forum where article did not refer to forum events or identify plaintiff as a forum resident).

119. *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 295-98 (1980). For discussion of the meaning of the term foreseeability in *Woodson*, *see, e.g.*, *Louis, The Grasp of Long Arm Jurisdiction Finally Exceeds Its Reach: A Comment on World-Wide Volkswagen Corp. v. Woodson and Rush v. Savchuk*, 58 N.C.L. REV. 407, 416-18 (1980); *Comment, World-Wide Volkswagen Corp. v. Woodson: A Limit to the Expansion of Long-Arm Jurisdiction*, 69 CALIF. L. REV. 611, 619-24 (1980).

120. *See supra* notes 71-74 and accompanying text.

121. *Compare, e.g.*, *Calder v. Jones*, 104 S. Ct. 1482, 1486-87 (1984) with *Church of Scientology v. Adams*, 584 F.2d 893, 898-99 (9th Cir. 1978).

any circulation whatsoever should have been foreseeable. Whatever protection afforded defendants by the due process minimum contacts requirement will be diminished by *Calder* and *Keeton* if courts can base jurisdiction on foreseeable harm alone. If this synergistic effect is realized, there is great potential for unfortunate results under the two opinions. This potential underscores the need for other procedural protections.

### C. Second-Stage Balancing

A few courts deciding jurisdictional disputes in libel cases have gone beyond the question of minimum contacts. Even when rejecting first amendment considerations, they have balanced other factors to determine whether the exercise of jurisdiction would offend the "traditional notions of fair play and substantial justice"<sup>122</sup> embodied in due process. The California Court of Appeal in *Calder*<sup>123</sup> expressly conducted second-stage balancing.<sup>124</sup> Although the Supreme Court's failure to review the balancing does create some doubt, this approach probably retains its validity because the Court affirmed the result.

Under the second-stage balancing approach, however, the outcome will not always favor the assertion of jurisdiction. An example comes from a case that, although not sounding in defamation, is similar to a typical challenge to jurisdiction in a defamation case. In *Burstein v. State Bar of California*,<sup>125</sup> the plaintiff was an unsuccessful examinee for the California Bar. Burstein, a Louisiana resident, filed an action against the California State Bar in a Louisiana federal court, alleging violation of her constitutional rights giving rise to a section 1983 action, and diversity claims for negligence and breach of contract.<sup>126</sup> The case factually was similar to the defamation actions discussed in this Article because there were a small number of active members of the California State Bar residing in Louisiana paying membership dues to and receiving literature from the Bar (53 people), and 89 law school students from Louisiana had applied to take the California Bar Examination during the 1970's.<sup>127</sup> Akin

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122. *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945). The balancing of factors as a second stage of analysis is discussed in a variety of sources. See articles collected in 69 CORNELL L. REV. 136, 164 n.155 (1982). Also, see *Sipple v. Des Moines Register & Tribune Co.*, 62 Cal. App. 3d 143, 153, 147 Cal. Rptr. 59, 65 (1978) for a list of factors to be balanced.

123. *Jones v. Calder*, 138 Cal. App. 3d 128, 136-37, 187 Cal. Rptr. 825, 831 (1982), *aff'd*, 104 S. Ct. 1482 (1984).

124. See *infra* notes 46-48 and accompanying text for a discussion of the factors balanced in *Calder*.

125. 693 F.2d 511 (5th Cir. 1982).

126. *Id.* at 513.

127. *Id.* at 518. These figures amount to less than 0.08% and 0.07%, respectively, of the Califor-



to defamation cases basing jurisdiction on a defamatory statement foreseeably distributed and causing harm in the jurisdiction,<sup>128</sup> the plaintiff also alleged that the Bar examiners' negligent grading of her examination caused foreseeable harm in the forum.<sup>129</sup>

Accepting that minimum contacts had been established, but considering the overall fairness of allowing the suit to proceed in a Louisiana forum, the Fifth Circuit concluded that the Bar was not amenable to jurisdiction in a Louisiana forum. The court reasoned that the burden on the Bar of litigating in the forum, the location of the likely witnesses, the source of law most likely to be applied (California), and a comparison of the respective interests of the two states, outweighed the interest of the plaintiff in having a home-state forum.<sup>130</sup>

The Tenth Circuit, which had previously rejected the *Connor* doctrine,<sup>131</sup> used second-stage balancing in a defamation case. In *American Land Program, Inc. v. Bonaventura Uitgevers Maatschappij, N.V.*,<sup>132</sup> one of the defendants was a reporter employed by a Dutch publisher who spent several weeks in the United States (including in Utah, the forum state) investigating the plaintiff. The defendant reporter allegedly slandered the plaintiff in Utah in the course of investigating his story. The court initially held that the defendant had engaged in purposeful activity that allegedly caused injury in the forum.<sup>133</sup> Balancing the fairness to the parties and the interests of the state, the court weighed the inconvenience to the Dutch defendant of appearing in a foreign forum against the facts that the plaintiff had no other United States forum available and that the Netherlands had no significant interests in the action.<sup>134</sup> Specifically rejecting once again the contention that first amendment considerations should be weighed in the balance, the circuit court found that overall, fairness to the parties permitted jurisdiction over the defendant reporter.<sup>135</sup>

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nia Bar members and applicants for comparable time periods. Personal communication with State Bar of California.

128. See cases cited *supra* note 117.

129. 693 F.2d at 518. The court firmly rejected this allegation. It perceived no harm done to the plaintiff in the forum. *Id.* at 520. After *Keeton*, however, it will be difficult for a court not to consider an allegation of harm to plaintiff's reputation in the forum. See *supra* note 71.

130. 693 F.2d at 523.

131. *Anselmi v. Denver Post, Inc.*, 552 F.2d 316, 324 (10th Cir.), *cert. denied*, 432 U.S. 911 (1977).

132. 710 F.2d 1449 (10th Cir. 1983).

133. *Id.* at 1452.

134. *Id.* at 1453.

135. *Id.* (citing *Anselmi v. Denver Post, Inc.*, 552 F.2d 316, 324 (10th Cir.), *cert. denied*, 432 U.S. 911 (1977)).

Although first amendment considerations cannot be explicitly considered after *Calder* and *Keeton*, standard second-stage balancing of interests, fairness and convenience may provide many of the same benefits.<sup>136</sup> On a case by case basis, small publishers may be able to demonstrate that the exercise of jurisdiction would be too burdensome.

#### D. *Forum Non Conveniens*

One of the first cases explicitly rejecting first amendment considerations in jurisdictional analysis was *Buckley v. New York Post Corp.*<sup>137</sup> The *Buckley* court did not, however, entirely reject first amendment considerations. It held that the more appropriate place for these concerns was in forum non conveniens.<sup>138</sup> The Second Circuit reasoned that because of then-recent changes in substantive libel law, it was unnecessary to superimpose a vague first amendment standard on long-arm jurisdiction. The court was also concerned about possible undue hardship for plaintiffs who lacked the financial resources to follow the publisher back to its home forum.<sup>139</sup> The court stated that its approach had the merit of focusing on the particular facts creating hardship in a case without imposing a uniform rule applicable regardless of the comparative burdens on the parties.<sup>140</sup>

The *Buckley* approach has been praised<sup>141</sup> and criticized<sup>142</sup> by commentators. Despite *Buckley's* notoriety,<sup>143</sup> courts have infrequently de-

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136. It is likely that the prime variable, distance from the forum to the point of publication, will continue to be a "pivotal factor." Scott, *supra* note 11, at 45. Also, in *McCabe v. Kevin Jenkins & Assocs., Inc.*, 531 F. Supp. 648, 654 (E.D. Pa. 1982), the court noted that the home state of the defendant publisher had a strong interest "in protecting its citizens from distant, possibly harassing litigation." *Id.* (quoting *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 292 (1980)).

137. 373 F.2d 175 (2d Cir. 1967).

138. *Id.* at 183.

139. *Id.* at 182-83.

140. *Id.* at 183. Under the facts of the case before it, a Connecticut resident seeking to sue the publisher of the *New York Post* in Connecticut's Fairfield County, the court did not find any inconvenience warranting dismissal. The court found no basis to support the prediction that such a suit would cause the *Post* to forfeit "substantial revenues" from sales in the forum. The Second Circuit also noted the economic and intellectual ties between New York City and southwestern Connecticut as well as the short distance from the newspaper's Manhattan headquarters to the courthouse. Allowing the mere existence of the state border to bar jurisdiction was said to substitute formalism for reality. *Id.* at 184.

141. *E.g.*, Comment, *Long-Arm Jurisdiction*, *supra* note 11, at 365 (1967); 4 SAN DIEGO L. REV. 347, 355 (1967).

142. *E.g.*, 66 MICH. L. REV. 542, 551 (1968).

143. *Buckley* is reprinted as a major case in a leading textbook. J. COUND, J. FRIEDENTHAL & A. MILLER, CIVIL PROCEDURE 101 (3d ed. 1980). It is discussed in several others. *E.g.*, R. FIELD, B. KAPLAN & K. CLERMONT, CIVIL PROCEDURE 825 (5th ed. 1984); J. LANDERS & J. MARTIN, CIVIL PROCEDURE 112 (1981).

cided defamation cases based on forum non conveniens. This author was unable to find any defamation case dismissed on the basis of forum non conveniens.<sup>144</sup> Forum non conveniens may be revived now that the Supreme Court has eliminated the jurisdictional approach. It is a procedural tool that should afford protection primarily to small and marginal publishers because they will be most able to demonstrate successfully under traditional principles of forum non conveniens that the plaintiff's chosen forum would create hardship in a particular case.

### *E. Motions to Transfer in Federal Court*

One reason that the common law doctrine of forum non conveniens is used infrequently in forum challenges in libel actions is that the federal courts now use a statutory alternative. The federal codification of forum non conveniens permits the transfer of any civil action "for the convenience of all parties and witnesses, in the interest of justice."<sup>145</sup>

The federal transfer statute has been invoked in at least one case where the court had previously excluded first amendment concerns from jurisdictional analysis. In *Westmoreland v. CBS, Inc.*,<sup>146</sup> General William C. Westmoreland alleged he had been libeled by a CBS News broadcast entitled, "The Uncounted Enemy: A Vietnam Deception."<sup>147</sup> General Westmoreland brought suit in the Greenville Division of the United States District Court for the District of South Carolina. Although the District Court in South Carolina had previously held that personal jurisdiction was not affected by first amendment considerations,<sup>148</sup> the court nevertheless carefully considered and granted the motion to transfer to the Southern District of New York.

The court observed that four of the five defendants resided in New

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144. In *Underwood v. University of Kentucky*, 390 So. 2d 433 (Fla. Dist. Ct. App. 1980), the Florida appellate court stated that it would have used forum non conveniens if it had not already found that jurisdiction was lacking in Florida in a libel action filed by a Kentucky resident on the basis of statements appearing in a book published by the University of Kentucky that had been written by one of its professors. *Id.* at 435. In *Cordell v. Detective Publications, Inc.*, 307 F. Supp. 1212 (E.D. Tenn. 1968), *aff'd on other grounds*, 419 F.2d 989 (6th Cir. 1969), the court stated that it preferred *Buckley's* forum non conveniens approach over *Connor's* jurisdictional approach to protecting first amendment considerations. The court did not, however, analyze the case using forum non conveniens principles. It simply held that jurisdiction was proper. *Id.* at 1216.

145. 28 U.S.C. § 1404(a) (1982). See generally 15 C. WRIGHT, A. MILLER & E. COOPER, FEDERAL PRACTICE AND PROCEDURE: CIVIL § 3845 (1976) (discussing section 1404(a)).

146. 8 Media L. Rep. (BNA) 2493 (D.S.C. 1982).

147. *Id.* For a popular discussion of the events leading to this prominent defamation action, see D. KOWET, A MATTER OF HONOR (1984).

148. *Westmoreland*, 8 Media L. Rep. (BNA) at 2496 (citing *Yarborough v. Time, Inc.*, No. 79-2398-3 (D.S.C. Jan. 26, 1981); *David v. National Lampoon, Inc.*, 432 F. Supp. 1097 (D.S.C. 1977)).

York City and the fifth defendant resided in Washington, D.C. Even for him, New York was more convenient than Greenville. The great majority of witnesses for both sides were located in New York.<sup>149</sup> In addition, because lengthy trial testimony would be required from many key executives of CBS News, it would be inconvenient for them personally and disruptive to CBS if they had to be present in South Carolina for a long time.<sup>150</sup> A large number of documents would be involved, most of which were located in New York or Washington, D.C. The plaintiff's personal documents, some located in South Carolina, were not of such large quantity that producing them for a trial in New York would pose any difficulty.<sup>151</sup> To the extent the action examined defendants' actions and state of mind, the action would examine activities conducted primarily in New York.<sup>152</sup> The plaintiff's lead counsel was in Washington, D.C., which was closer to New York than to Greenville, and he also had counsel of record in New York. The defendants' lead counsel was also in New York. On balance, convenience to counsel would be enhanced by transferring the action to New York.<sup>153</sup>

The action's only connections to South Carolina were that the television program was shown there when it was broadcast nationwide and that the plaintiff resided there.<sup>154</sup> Balancing these factors, the court concluded that the plaintiff's choice of forum had to yield because the balance of convenience tipped so decidedly in favor of a transfer.<sup>155</sup>

In conclusion, the court noted that while it had refused to consider first amendment rights as part of personal jurisdiction analysis, it did believe that venue could properly include these considerations. The court asserted

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149. In response to an interrogatory, the plaintiff had identified 37 persons with knowledge or information related to the complaint. Twenty-five of them lived in New York; none lived in South Carolina. Although the plaintiff also identified fifteen character witnesses living in South Carolina, the court thought that their participation would be less extensive than the other witnesses. Also, the court noted that it would not permit more than three character witnesses to testify. *Id.* at 2495.

150. *Id.*

151. The court noted that modern copying and transportation precluded making the location of documents controlling. However, with a large number of documents, their location was a factor to be weighed. *Id.*

152. *Id.*

153. *Id.*

154. *Id.* at 2496. The court did not attempt to rule on plaintiff's contention that South Carolina law would govern the action because the factors in favor of change of venue were compelling in any event. *Id.* at 2495. The Supreme Court has stated that choice of law is a factor to be considered in deciding a motion to transfer. *Van Dusen v. Barrack*, 376 U.S. 612, 643-46 (1964).

155. 8 Media L. Rep. (BNA) at 2496. The court may have been suspicious of General Westmoreland's choice of forum because he did not bring the action in his home division of the district (Charleston), and he annually visits New York more than twice as often as he visits the Greenville Division. *Id.*

that whatever chilling effect might be created by a trial at tremendous expense in a distant forum would be obviated by a transfer of venue.<sup>156</sup>

Other defendants have not been able to invoke section 1404(a) successfully. In *Stabler v. New York Times Co.*,<sup>157</sup> the defendant newspaper was unsuccessful in obtaining a transfer from the Southern District of Texas to the Southern District of New York. The court cited several factors in refusing to disturb the plaintiff's choice of venue—the plaintiff's home and business were located in Texas, as were all persons required to testify about the damage to plaintiff's business interests, and the majority of plaintiff's other witnesses were located in the Southwest and Western United States. The court concluded that any benefit that might accrue to the defendant newspaper, *The New York Times*, by a transfer would be offset by the hardship and added expense to the plaintiff and nearly all of his witnesses.<sup>158</sup> It is ironic that in contrast to *Westmoreland*, a case decided in a district court that had previously rejected first amendment considerations, the *Stabler* court, located in the circuit that originally ruled that first amendment considerations belonged in personal jurisdiction analysis, did not consider matters of convenience for the defendant, such as the location of the witnesses for the *New York Times* or the location of its documents.<sup>159</sup>

Assuming both cases were correctly decided on the facts, the two cases are a stark indication that first amendment considerations are not, and should not be, a talisman that obscures the necessity of carefully weighing the traditional factors of convenience before deciding a motion to transfer venue in a defamation action. Although in *Westmoreland* a media giant, CBS, was able to invoke section 1404(a) successfully, smaller publishers should have equal success if they can demonstrate that their case should be transferred for the convenience of all.

## V. SUMMARY AND CONCLUSION

The Supreme Court of the United States gave a strong signal in *Calder* and *Keeton* to lower courts that publishers are not entitled to special protection from jurisdiction that is otherwise proper under the due process

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156. *Id.* at 2496-97.

157. 569 F. Supp. 1131 (S.D. Tex. 1983).

158. *Id.* at 1137-38. See *supra* text accompanying note 140.

159. For example, the court ignored the fact that none of the four reporters who worked on the allegedly libelous article were located in the Texas forum. 569 F. Supp. at 1133-34. Compare *Akbar v. New York Magazine Co.*, 490 F. Supp. 60, 67 (D.D.C. 1980) (rejecting motion to transfer venue where balance of availability of witnesses and evidence and convenience to parties was "decisively" in favor of plaintiff's chosen forum).

clause. The sweeping denunciations of the *Connor* doctrine in *Calder* and *Keeton*, however, create the risk that the lower courts will fail to give defamation defendants the same protection given to other defendants under the due process clause and related jurisdictional devices.

The risk is particularly grave when the synergistic effect of the two opinions is considered: The concern is that a publisher foreseeably referring to a plaintiff in a harmful manner will be haled into court in any forum with any circulation of the publication because of the foreseeable harmful effect to that plaintiff's nominal reputation in that forum. This would deprive such a publisher of any protection under the minimum contacts approach to personal jurisdiction under the due process clause.

To forestall these undesirable possibilities, while accepting the strength of the Supreme Court's signal in two essentially unanimous companion opinions, this Article has presented other preliminary procedural protections that remain available to publishers. These are: (1) long-arm statutes that exclude forum circulation as the basis for jurisdiction; (2) forum circulation that does not meet the requirements for minimum contacts; (3) lack of foreseeable injury in the forum; (4) "second-stage balancing" in jurisdictional analysis under the due process clause; (5) forum non conveniens; and (6) motions to transfer in federal court. Although the *Connor* doctrine is now discredited, these procedural devices should provide limited protection in cases factually similar to those that rejected the *Connor* doctrine yet did not require the media defendant to defend itself in a distant forum. Some devices apply elements of traditional due process analysis, such as second stage balancing; others apply non-constitutional methods, such as forum non conveniens. With the important exception that the foreseeable effects test may render irrelevant cases finding no minimum contacts, these devices appear capable of filling the gap left after the demise of the *Connor* doctrine. Admittedly, some of these preliminary procedural devices will also protect large, national publishers in extreme instances. Such publishers have always been entitled to use these devices; nothing in the *Connor* doctrine would have forbidden such a result. More importantly, these devices can replace the limited protection once afforded the smaller and marginal publishers by *Connor*. Because these approaches are from courts that had previously rejected *Connor*, they retain viability after *Calder* and *Keeton*.

A chilling effect on small publishers has long been recognized as one cost of avoiding burdensome defamation suits in distant forums. It will be an unfortunate and unnecessary blow to first amendment values if lower courts fail to recognize the limited holdings of *Calder* and *Keeton* and simultaneously fail to recognize that the procedural devices discussed in this Article remain available to minimize the chilling effect on small pub-

lishers and those with marginal circulation. Although the Supreme Court did not trouble itself to provide guidance through carefully written opinions, the lower courts can provide appropriate protection if they avoid the temptation to be similarly cavalier.

